IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL NO. 99-711-16**
	:	
v.	**:**	
	:	
JUAN MELENDEZ	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **October 4 , 2006**

On October 3, 2001, Petitioner Juan Melendez ("Melendez") pled guilty in a cooperation plea agreement to one count of conspiracy to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. § 846. On September 9, 2003, the Court sentenced him to 119 months imprisonment, five years supervised release, a $100 special assessment, and a $2000 fine. Now before the Court is Melendez's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow, his Motion will be denied.

I. BACKGROUND

On September 13, 2004, Melendez filed a pro se motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence based on ineffective assistance of counsel. Because Melendez did not use the correct form for his motion as prescribed by Local Rule 9.3(a), the Court gave him thirty days to file corrected forms or face dismissal. Melendez filed his corrected § 2255 motion on October 12, 2004. The Government filed its response on December 23, 2004, requesting that the Court hold an evidentiary hearing and appoint counsel to represent Melendez at that hearing. Shortly thereafter, the Court appointed Andres Jalon to represent Melendez, and on February 24, 2006, Mr. Jalon filed a supplemental § 2255 motion on Melendez's behalf also requesting an evidentiary hearing.

Melendez's motion claims that his counsel at sentencing, Roland Jarvis, was ineffective because he asked Jarvis to file an appeal after his sentencing, but no appeal was filed. Since Jarvis disputes this claim, the Court scheduled a hearing to give Melendez the opportunity to "prove that he made the request and that the lawyer failed to honor it." Solis v. United States, 252 F.3d 289, 295 (3d Cir. 2001). The hearing was held on September 12, 2006.

II. LEGAL STANDARD

A defendant claiming ineffective assistance of counsel must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 689-92 (1984). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In evaluating counsel's performance, the Court should be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (citation omitted).

With respect to the first part of the Strickland test, "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (noting that counsel's failure to file a notice of appeal is a ministerial as opposed to a strategic decision and that failure to file reflects "inattention" to a defendant's wishes). Under the second part of the Strickland test,

"[p]rejudice is presumed from counsel's failure to file a notice of appeal when so requested by a client." See Solis, 252 F.3d at 293-94. A defendant need not establish that his appeal would have succeeded or even had merit to succeed on a claim for ineffective assistance of counsel for failure to file an appeal. Id. at 295.

III. ANALYSIS

As noted above, this Court held a hearing on September 12, 2006 for the purpose of allowing Melendez to present his claim that Jarvis did not follow his instruction to file an appeal. Having heard testimony from both Melendez and Jarvis, the Court finds that Defendant has not demonstrated that he asked his attorney to file a direct appeal.

Melendez admitted at the evidentiary hearing that he did not ask Jarvis to file an appeal within ten days after his sentencing. He further admitted that at his sentencing he was advised on the record by the Court of his appellate rights, including the ten day deadline for filing a notice of appeal. However, he testified that he was unable to inquire about, and therefore was not aware of, the sentencing issue he seeks to appeal until March or April of 2004, following his transfer from state to federal custody. Thus, the only issue for the Court is whether Melendez asked Jarvis to file an appeal after the time period for filing a notice of appeal had already expired.

Melendez acknowledged that a letter he sent to Jarvis on April 7, 2004 did not specifically request an appeal, but testified that he asked Jarvis to file an appeal in a telephone conversation at some point after his transfer to federal custody. However, Melendez offered no further evidence to support his testimony. Jarvis, on the other hand, testified at the hearing that he does not recall Melendez ever "directing me, asking me, or talking to me" regarding the filing of an appeal. Moreover, Jarvis testified that, given the excellent result at Melendez's sentencing, he would have remembered such a request and would have advised against an appeal even if

Melendez had ever asked him to file one. The Court finds Jarvis's testimony to be credible. Accordingly, the Court finds that Melendez has failed to demonstrate that Jarvis was ineffective in failing to file an appeal.

IV. CONCLUSION

After hearing testimony and considering the record before us, the Court finds that Defendant's arguments as to his counsel's ineffectiveness do not warrant granting his motion. An appropriate Order follows.

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ORDER

AND NOW, this 4th day of October, 2006 upon consideration of Petitioner Juan Melendez's Motion to Vacate, Set Aside, or Correct Sentence (docket no. 757), the Government's response thereto, and the testimony presented at the September 12, 2006 hearing, it is **ORDERED** that:

(1) The Motion is **DENIED**.

(2) The Clerk of the Court shall mark Civil Action No. 04-4322 **CLOSED**.

(3) Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman

BRUCE W. KAUFFMAN, J.